

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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4 MICROSOFT CORPORATION,)
5 Plaintiff,) 10-01823-JLR
6 v.) SEATTLE, WASHINGTON
7 MOTOROLA INC., et al,) April 11, 2012
8 Defendants.) Argument on TRO
9)

10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE JAMES L. ROBERT
12 UNITED STATES DISTRICT JUDGE
13 -----

14 APPEARANCES:

15
16 For the Plaintiff: Arthur Harrigan, Christopher
17 Wion, David Pritikin and Andy
18 Culbert

19
20 For the Defendants: Jesse Jenner, Ralph Palumbo, Mark
21 Rowland, Philip McCune and Neill
22 Taylor
23
24
25

1 THE CLERK: C 10-1823, Microsoft versus Motorola.
2 Counsel, please make your appearances.

3 MR. HARRIGAN: Art Harrigan representing Microsoft,
4 and with me at counsel table is my partner Chris Wion; David
5 Pritikin from the Sidley firm; and Andy Culbert from
6 Microsoft.

7 MR. JENNER: Jesse Jenner on behalf of Motorola.
8 With me is Ralph Palumbo, Neill Taylor from Motorola, and
9 Mark Rowland who spoke this morning.

10 THE COURT: Counsel, because I want to be fair to all
11 of you, if we are proceeding under the ITU agreement it has
12 different language in it and the language talks about
13 worldwide impact. And so I want to make sure that you're
14 aware of the fact that that weighs heavily on the court so
15 that you don't get surprised, and I head off in a direction
16 that all of you think is somewhere down the rabbit hole. So
17 if you need to reduce your presentations to first-grade
18 level, I won't be offended.

19 Mr. Harrigan.

20 MR. HARRIGAN: I'm still working on getting there,
21 Your Honor. Thank you.

22 First of all, Your Honor, we agree that the *Gallo* case is
23 what this is about. And I don't think it's contested that
24 the parties are the same, functionally the same in the two
25 cases. The question then is whether the issues are the same,

1 which in this circuit boils down to whether this action would
2 be dispositive of the claims in the German action. And I
3 will start by explaining why we believe that that is true.
4 And I'm just citing for that, *Applied Medical*, which says
5 that the issues are functionally the same if one action is
6 dispositive of the other.

7 We've handed up a notebook, Your Honor, and if you could
8 turn to Tab 1.

9 THE COURT: I have a plethora of notebooks up here.

10 MR. HARRIGAN: This is a skinny little one.

11 THE COURT: It has six tabs in it?

12 MR. HARRIGAN: It does.

13 THE COURT: Then I've got it.

14 MR. HARRIGAN: Tab 1 is the Motorola letter relating
15 to the H.264 standard that was sent to Microsoft on
16 October 29, 2010. And the little purple tabs are the pages
17 where there is, in yellow highlighting, the two patents that
18 are at issue in Germany. So those two patents were part of
19 this letter. And not only does the standard, as the court
20 just noted, require that the license be worldwide, but this
21 letter and the attachment indicates that it was intended to
22 apply to those specific patents that are at issue in Germany.
23 And the very first line confirms Motorola's offer to grant
24 Microsoft a worldwide non-exclusive license.

25 So, a ruling in this case that Microsoft is entitled to a

1 RAND license to the patents that were offered in this letter
2 would remove any basis for -- for further action in Germany
3 on infringement, assuming that Microsoft actually got the
4 license.

5 Now, where we stand on that is that first of all we are
6 asking this court, and we have been -- we have had it in our
7 pleadings from day one -- to determine a RAND rate under
8 these standards. And we have also stated, I believe
9 unequivocally for the first time in September of 2011, not in
10 April of 2012 as Motorola suggests, that we are committing to
11 take such a license, and if the court agrees that we are
12 entitled to one -- which we believe is simply a function at
13 this point of whether the court agrees that we have not
14 repudiated by filing this lawsuit seeking to enforce the
15 contract.

16 So, we believe that because at the end of the day, and
17 that day is hopefully not too far off, the court should rule
18 and we hope will rule that we are entitled to a license
19 worldwide that includes the German patents, that will dispose
20 of all of the issues in the German case, but in particular
21 will clearly dispose of the one issue that this TRO is
22 focused on, and the preliminary injunction request, which
23 that is whether Motorola can get an injunction.

24 I'd like to point out, I think it's significant here in
25 terms of comity, to the extent comity is even involved, which

1 I'll get to in a minute, that the anti-suit injunction that
2 we are asking for is only about the injunction. We are not
3 asking the court to stop Motorola from proceeding in Germany.
4 It can proceed to establish whatever it needs to over there
5 with regard to infringement and ask for royalties and damages
6 and so forth.

7 All we're asking the court to do is to prevent them from
8 enforcing an injunction in Germany, which is a much narrower
9 request than all. But the *Medtronic* case was very similar,
10 and I'll get that one out of the way right now. In that case
11 the court didn't use the anti-suit standard as such, but it
12 determined because there was a likelihood that a contract
13 would preclude injunctive relief, the court as -- and
14 irreparable harm would result if there were injunctive relief
15 granted in the other forum, the court would enjoin the
16 enforcement of the injunction, in effect, but let the
17 infringement part of the case go forward. That's what we're
18 asking for.

19 And I believe that since really the only issue is
20 repudiation, and this court has already expressed doubt about
21 the validity of that argument, that we have a close parallel
22 here to the *Medtronic* case, because of the limited relief
23 we're asking for, particularly.

24 Let's move on here for a second to establish a couple
25 other preliminary items. In Tab 2 we have quoted from our

1 original complaint, and it has been suggested by Motorola
2 that Microsoft did not ask the court to determine a RAND
3 rate, and you'll see from the underlying "triple I" section
4 there that we, in fact, did so in the original complaint and
5 the same language appears in the amended complaint.

6 And then pinning down what I just said with regard to
7 Microsoft's having committed to take the license back in
8 September of 2011 we said, "Microsoft is seeking and remains
9 ready and willing to take a license to Motorola's H.264 and
10 802.11 declared-essential patents on RAND terms." That
11 statement was repeated several times. Then if you turn to
12 the next page in the March 28, 2012, pleading referred to
13 here in our motion for TRO and preliminary injunction, we
14 said, in the second underlined portion: Coupled with
15 Microsoft's express commitment to accept a RAND license, and
16 this necessarily means Motorola cannot enjoin Microsoft, et
17 cetera.

18 So, we have the prayer in the complaint to set a RAND
19 rate, we have a commitment to take the license at that rate
20 that the court sets, and therefore the only issue here that
21 could preclude Microsoft from having a RAND license is if the
22 court decides this lawsuit was a repudiation instead of an
23 effort to enforce the contract.

24 So therefore we believe this case is dispositive of the
25 German action for that reason, and certainly of their right

1 to injunctive relief.

2 Secondly, this case could be --

3 THE COURT: Let me stop you there for a moment. In
4 looking at the cases that followed *Gallo*, it has been
5 important to the court if this was a question of United
6 States law or foreign country law. And if it's foreign
7 country law, is it something that would traditionally belong
8 in their courts? What jurisdiction do I have to tell a
9 German court how to administer German law in regards to
10 German patents?

11 MR. HARRIGAN: Your Honor, the anti-suit standard is
12 whether this case will be dispositive of the issues in the
13 German action, which was filed long after this one. And Your
14 Honor has the authority to -- and the discretion to order
15 Motorola not to enforce the injunction. We can't order the
16 court not to grant one, and we're not asking you to. But the
17 granting of -- the enforcement of that injunction will be
18 barred by the decision of this court that Microsoft has a
19 license.

20 One of the things that is unique -- I don't know if it's
21 unique, but it's German -- about this case is that in Germany
22 they don't care why you don't have a license. They don't
23 care whether you don't have a license because Motorola
24 breached its RAND commitments. They don't care whether you
25 don't have a license because they never offered you one on

1 reasonable terms. If you don't have a license and you get
2 enjoined, unless you jump through these various hoops that
3 Motorola has described, and those hoops are designed with --
4 the only boundaries around the award, in effect, or the
5 royalty that's established is failing to -- is avoiding
6 antitrust violations.

7 And the sole declaration that you have on German law
8 states that. And it also states that no one has determined
9 that that means that they have to be what we would call RAND.
10 No one has equated those two things.

11 THE COURT: Well, and since you've raised that
12 subject, borrowing from Judge Posner's remarks in another
13 Motorola case, and combining it with the substantial
14 experience in this district, why isn't Microsoft's remedy
15 here to amend its complaint and basically describe Motorola
16 as a patent troll, which is seemingly the conduct that's
17 going on here, in a pejorative sense, on enforcement of a
18 patent that they've acquired, and in an antitrust claim,
19 which in Judge Posner's view is really what this battle has
20 morphed into.

21 MR. HARRIGAN: Well, Your Honor, we could do that.
22 But all we're doing today is trying to stop a German
23 proceeding that is duplicative of this case and of which this
24 case will be dispositive.

25 And under the anti-suit standard we obviously don't have

1 to establish that the conduct that's embodied in the foreign
2 court is an antitrust violation. We merely need to establish
3 that the first-filed case will be dispositive of the issues
4 that are controlling in that case.

5 And, of course, we have to meet one of the other four
6 factors described in *Gallo* and *Seattle Totems*, which I'll get
7 to in a minute. But the whole point of the *Gallo* case was
8 that it was taking -- it was an effort to elucidate what I
9 believe the court basically set as a standard for deciding
10 anti-suit cases. And it basically said the preliminary
11 injunction standard is not applicable in this context.
12 Here's what you have to do. And the first thing is it's
13 dispositive if the first-filed action is dispositive. Second
14 thing is does one of these four criteria apply? And the
15 third thing is, if one does, are we somehow or other having
16 an unacceptable impact on comity?

17 That's it. I think that your thought about amending the
18 complaint to allege an antitrust violation is a good idea,
19 but it's not -- I don't believe it is a part of the current
20 -- of the analysis that the court has to go through in order
21 to decide this motion.

22 THE COURT: Is there a choice of law provision in the
23 ITU agreement?

24 MR. HARRIGAN: I don't believe so, subject to
25 correction.

1 It's a worldwide contract. I don't believe there's any
2 choice of the law provision in it.

3 THE COURT: Please continue.

4 MR. HARRIGAN: So, Your Honor, you said you didn't
5 want to hear about *Seattle Totems*, and I won't spend much
6 time on it. But, could we take a look --

7 THE COURT: The law appears to have moved on, or at
8 least been clarified since *Seattle Totems*.

9 MR. HARRIGAN: I'm sorry?

10 THE COURT: The law has been clarified since Judge
11 Coughenour's opinion in *Seattle Totems*.

12 MR. HARRIGAN: But I would like to just point
13 something out in the *Gallo* case, which is at Tab 5. And
14 we've highlighted some sections of that case, and I'm looking
15 at page 4 of the Lexis printout. And the third yellow
16 highlighted paragraph on the left side. This is where the
17 court says that, "*Gallo* need only demonstrate the factors
18 specific to an anti-suit injunction weigh in favor of
19 granting the injunction." And the last sentence they say,
20 "This test, the new one we're announcing, we conclude is
21 consistent with *Seattle Totems*."

22 So even though *Gallo* announces a new standard, it also
23 says *Seattle Totems* was correctly decided under this
24 standard. And I'm only pointing that out because, Your
25 Honor, this is what the *Seattle Totems*' decision was based

1 upon, according to the Ninth Circuit in affirming it.

2 In the case before us, the validity of the '72-'74
3 agreements will be the central issue in both the Canadian and
4 American litigations. Adjudicating this issue in two
5 separate actions is likely to result in unnecessary delay and
6 substantial inconvenience and expense to the parties and
7 witnesses --"

8 THE COURT: You need to slow down, counsel.

9 MR. HARRIGAN: Sorry?

10 THE COURT: You need to slow down if you want to have
11 a record of what you're saying.

12 MR. HARRIGAN: I gotcha, sorry.

13 "-- unnecessary delay and substantial inconvenience and
14 expense to the parties and witnesses. Moreover, separate
15 adjudications could result in inconsistent rulings or even a
16 race to judgment." And the German case is a blitz proceeding
17 that started long after this one and is very close to being
18 over. And I believe that it's fair to say that those factors
19 that were in the *Totems* case are all present in this case.
20 And now I'm going to get to what the others are that are
21 present in this case that make it a much stronger case than
22 *Seattle Totems*, but which *Gallo* approved under the new
23 standards.

24 First of all, there's no doubt that if an injunction is
25 granted in Germany there will be irreparable harm. That's

1 established in the Microsoft declarations. And it's quite
2 clear that having to take Windows off the shelves, and so
3 forth, is going to be huge. And even the preparations for
4 it, if an injunction were entered and Motorola posted a bond,
5 you know, within a week or so there would have to be all
6 kinds of preparations for it, which would be damaging to
7 Microsoft and its partners.

8 Now, so we have irreparable harm here even though I
9 believe personally that under the *Gallo* standard you don't
10 need to show irreparable harm. It is just one of the
11 equitable factors under factor No. 4 that should be taken
12 into account. But we have *Seattle Totems*, plus irreparable
13 harm. There was no irreparable harm in that case at all.

14 Now, the other -- the answer to that, I guess is, well,
15 look at all these ways that you can avoid an injunction in
16 Germany. Well, one of the ways, Your Honor, is first of all
17 as I said before there is no limitation in Germany to RAND.
18 There is only a limitation to avoiding an antitrust
19 violation. That's the only protection Microsoft has with
20 regard to the amount of the royalty.

21 But think about this, Your Honor, Motorola is saying you
22 can avoid having an injunction, so I guess it's okay with
23 Motorola if there's no injunction, as long as they get an
24 Orange Book offer under one of the two ways of doing that.
25 But why, then, if all we have to do is go through a process

1 to get a rate, why do they want to have the threat of
2 injunction still hanging over that procedure? The reason is,
3 they want to coerce Microsoft into paying more than a RAND
4 rate. They want to get it right up there to the bottom of
5 wherever you cross the line into antitrust violations.

6 So the notion that there's some reasonable way to avoid
7 this in Germany is just plain wrong. For example, when we
8 proposed to post a \$300 million-dollar bond to support this
9 temporary restraining order, Motorola says, well, why don't
10 you just put that in escrow -- which is what they're
11 proposing -- and then Motorola can propose a rate, which it
12 may say is not only for the German patents, but that it wants
13 to be a worldwide rate, which they have suggested in the
14 German case. And we know that's going to be 2.25 percent at
15 least, if not more.

16 And then if someone determines later that that was too
17 much, you can file a lawsuit and try and get the money back.
18 That is vexatious and oppressive. And it also completely
19 supplants the jurisdiction of this court where we have asked
20 that a RAND rate be set, we have committed to take the
21 license, and that will preclude an injunction in Germany,
22 among other things.

23 So the other aspect of the German action that I believe
24 triggers the anti-suit, granting the anti-suit motion is that
25 it does violate a policy of the forum, which is the third one

1 that could potentially apply here as this is obviously not in
2 rem.

3 Germany does not recognize that Motorola's breach that we
4 allege in this case is a defense. All they care about is, do
5 you have a license or do you not have a license? That means
6 that Motorola can breach and get injunctive relief and use
7 that threat to extract excessive royalties. No U.S. court
8 would enter the kind of injunction the German court is
9 potentially going to enter, where there was a serious issue
10 about whether the -- whether Motorola had breached and was
11 entitled to anything. That would not happen in this
12 jurisdiction.

13 And the same is true if there were a serious issue with
14 regard to Microsoft's entitlement to a license. A court in
15 this country would say: Let's see if you've got a license
16 first; under RAND terms let's evaluate whether Motorola in
17 fact demanded outrageous royalties; and then we'll figure out
18 what kind of relief should be awarded if Microsoft still
19 doesn't have a license.

20 Those are judicial policies of contract enforcement. In
21 this case it's a worldwide contract that therefore this
22 jurisdiction's policies of upholding such contracts will, in
23 fact -- does, in fact, have a worldwide application. And
24 Motorola's tactic, combined with the way the German courts
25 work, is an attack on the effectiveness of the standards,

1 because the standards depend upon the courts enforcing RAND
2 when the parties are unable to agree on what RAND is, which
3 is all we are asking this court to do.

4 Now, there's been some discussion about how long we
5 waited. And I'll get to -- so, Your Honor I guess the bottom
6 line here is, we believe we've satisfied three of the four
7 factors that are -- that the *Gallo* court approved to
8 determine whether you reached the issue of comity. And I'll
9 get to comity in a second.

10 But with regard to the question of timing, I would like to
11 just explain what Microsoft did, and why, at various times.
12 The German action was begun in the summer, I believe, and I
13 can stand corrected on that, in August. What Microsoft did
14 in response to that was, let's file a summary judgment motion
15 so that we can get a ruling that we're entitled to a license,
16 and subject to setting a rate, before this German thing
17 reaches its conclusion. So we filed that motion in August.
18 We followed it up, which the court was not happy with, a bit
19 later with another summary judgment motion to ask the court
20 to rule specifically that injunctive relief was not
21 appropriate, both because we were entitled to a license and
22 because of lack of irreparable harm.

23 Now, what happened is that the court has now decided the
24 first two elements of our motion. So that it's now
25 established, and it's actually eventually conceded, that

1 Motorola is bound by its RAND commitments and Microsoft is a
2 third-party beneficiary.

3 That set the stage for us to say, because we've committed
4 to take a license, and because we've asked the court to set a
5 rate, the court should stop this German proceeding because of
6 the fact that it is highly probable that we're going to end
7 up with a license, unless the court decides filing the
8 lawsuit was a repudiation. So that was the sequence of
9 events.

10 And in terms of comity, as I said before, even in the
11 anti-suit motion itself we have limited it to the injunctive
12 relief issue. We're not asking that the court order Motorola
13 to cease all activities in the German court.

14 So, now on the subject of comity, if we can look at the
15 *Gallo* case one more time. So much is made of the fact that
16 the *Gallo* case involved a forum selection clause. But I
17 believe that first of all with regard to its enunciation of
18 the new standard, that clearly was not -- it was clearly not
19 limited to that situation. It was -- the court stated
20 specifically, and this is on page 3, that *Totems* had not
21 elucidated a precise framework for the courts to apply, when
22 deciding to issue an anti-suit injunction. And that we now
23 turn to these issues, and they basically rejected the
24 preliminary injunction test, and adopted the four-factor
25 test. So that was a general statement to guide the trial

1 courts in applying the anti-suit standard.

2 Then when they get to the issue of comity, they said two
3 things about that. If you look at page 6, the first
4 statement they made relates to the forum issue, and what the
5 court says is that because there is a private agreement to
6 litigate disputes in a certain forum, one party's filing
7 first in a different forum does not implicate comity.

8 So the forum selection issue in that case was brought up
9 because it disposed of the issue of comity, because there was
10 a forum selection of the domestic case, and it disposed of
11 the fact that normally these things are done where the
12 domestic case is the first one file, and here the Venezuela
13 case was the first one filed. And, of course, it doesn't
14 matter if there is a forum of selection clause, comity is out
15 the window.

16 Then it goes on to describe the general way in which
17 courts should deal with comity in this type of a case,
18 meaning a private dispute. It says, "No public international
19 issue is raised in this case. There is no indication that
20 the government of Ecuador is involved in the litigation.
21 Andina is a private party in a contractual dispute with
22 *Gallo*, another private party. The case before us deals with
23 enforcing a contract and giving effect to substantive rights.
24 This in no way breaches norms of comity."

25 So I believe, Your Honor, that the comity analysis in this

1 case is just that simple. The contract is the RAND contract.
2 Microsoft is seeking to enforce its rights under that
3 contract here. If it succeeds, that will dispose of the
4 German action. It's a private dispute between private
5 parties. And everything that *Gallo* said about that case is
6 true of this case. So that basically the Ninth Circuit is
7 saying, in private disputes of this type comity is not
8 breached, the norms of comity are not breached without some
9 extraordinary involvement of public international issues or
10 the government of the other country, et cetera. And this is
11 part of *Gallo's* elucidation of the new standard.

12 Now, I attempted here, in presenting this, to answer the
13 court's questions. But I'm now going to quickly run down
14 those questions.

15 THE COURT: I think you're fine.

16 MR. HARRIGAN: All right.

17 THE COURT: You've covered the things I want to know.
18 If you want to save any of your time you should probably just
19 wrap up.

20 MR. HARRIGAN: Thank you, Your Honor.

21 THE COURT: Mr. Jenner.

22 MR. JENNER: Your Honor.

23 THE COURT: Nice to see you in person again.

24 MR. JENNER: Thank you. I appreciate the court's
25 indulgence as to the affairs last week.

1 THE COURT: It was fine.

2 MR. JENNER: Your Honor, we certainly agree, because
3 we expressed it in our papers, that *Gallo* is the test. *Gallo*
4 has a gloss put on it by *Applied Medical*, which is the
5 subsequent Ninth Circuit case. I'll mention that in passing
6 I don't think it's terribly important, but it may play a role
7 here.

8 The first thing I'd like to do, because it's in the reply
9 brief that we didn't get a chance to respond to in writing,
10 is dispose of one thematic issue that runs through the reply
11 brief, which is a total red herring. And that is all of
12 these references to first filed. That's a red herring for
13 two reasons.

14 One, because on the facts of what they actually pleaded
15 and the prayer for relief, there is no request in the prayer
16 for relief that the court set a RAND rate, it's just not
17 there. They're pointing to something that they said in the
18 background of the case in paragraph 9, of a 102-paragraph
19 complaint. And when you look at the actual request for
20 relief that they made, at Tab 1, you will find conspicuously
21 absent from what they actually asked the court to decide --
22 sorry, Tab 2, I guess it is -- Tab 3. Tab 3, the last page
23 of Tab 3, page 22 of the complaint, is what they actually
24 have asked the court to do in the amended complaint, and that
25 is very astutely asking Your Honor for determination decrees

1 that Motorola hasn't offered reasonable rates.

2 They don't ask you to set a rate. They don't say they'll
3 take a license. They don't say they want a license. They
4 ask you simply to say -- decree that Motorola is required to
5 offer them a license on RAND terms, so that they can keep
6 that in their hip pocket, which was the original intent. If
7 things went south, they would ask for a license. But they
8 didn't ask you for a license. They didn't ask you to set a
9 rate.

10 If they want to amend their complaint to ask the court to
11 set a rate, that's another matter. But they didn't do that.
12 So the first time they actually appeared to be asking Your
13 Honor to set a RAND rate is in this September brief that they
14 mentioned. So that if first to file did matter, they first
15 asked for that after the German proceedings were instituted.
16 Microsoft's action, if they properly amended the complaint,
17 is the second-filed action, it is not the first-filed action.
18 But that doesn't really matter, because as I said it's a red
19 herring.

20 And I thank Microsoft actually for putting *Gallo* in here,
21 because if Your Honor will turn with me to Tab 5, where the
22 *Gallo* case is, you will see in the highlighted portion,
23 highlighted by Microsoft on page 6 of *Gallo* at Tab 5, they
24 call to Your Honor's attention that the foreign action was
25 the first-filed action. That's the action that was enjoined

1 in *Gallo*. So the policy of the Ninth Circuit --

2 THE COURT: I'm sorry, I got mixed up. What page are
3 you on?

4 MR. JENNER: I'm on Tab 5, the *Gallo* case, it's
5 page 6, where they have highlighted for us in the right-hand
6 column, that the foreign action that they wanted to enjoin in
7 *Gallo* and did enjoin in *Gallo*, was the first-filed action.
8 So to suggest that the seminal case, *Gallo*, suggests that the
9 first-filed action gets precedence, you can't find that
10 anywhere. Because in this case it's the first-filed action
11 that got enjoined. There is no such rule. The cases don't
12 support such a rule. It's just not a *Gallo* requirement.

13 So all of that material in the argument and in the reply
14 brief about first to file being important, as if this were a
15 venue case, is just wrong. It's not a requirement. It
16 shouldn't be considered.

17 So let me go through the requirements. The first
18 requirement is specifically whether or not the parties are
19 the same. While the parties are not precisely the same, Your
20 Honor, we don't think that makes a real difference here.
21 They are, in fact, a little bit different. But I don't think
22 that's going to affect how Your Honor acts, and whether the
23 issues are the same, and whether or not the first action is
24 dispositive of the action to be enjoined.

25 That's where the gloss of the *Applied Medical* case comes

1 in. Because the *Applied Medical* case explains that that
2 factor means: Will the domestic action be capable of
3 disposing of all the issues in the foreign action? The two
4 actions, says *Applied*, are functionally the same if all
5 foreign claims can be resolved in the local action. And
6 that's plainly not the case here.

7 This is a case, if you disregard for a moment the 1823
8 patent infringement claims, which I will come to, because
9 they're different from the ones in Germany, and just look at
10 the 1823 breach of contract claims, which are very limited in
11 terms of what Microsoft pleaded. The German action, the
12 foreign action is a German patent infringement action. We're
13 talking about Microsoft's suggestion that Your Honor should
14 interfere with a German patent infringement action that has
15 unique German remedy proceedings that are currently underway,
16 that are being interpreted and applied by a German court.

17 I'll come to the fact that that's a gargantuan intrusion
18 on comity. But for purposes of factor No. 1, it's a
19 different proceeding with different issues. What Microsoft
20 would like you to do in derogation of *Gallo* and *Applied*
21 *Medical*, is to cherry pick the RAND rate issue that they
22 haven't even asked for in Seattle, and equate that to the
23 Orange Book proceeding in Germany, which is a completely
24 different proceeding to set a remedy in Germany.

25 Let me talk about the Orange Book proceeding.

1 THE COURT: You aren't getting any traction on the,
2 "I haven't been asked to set a RAND rate." I mean, you stood
3 at that very podium and told me that you needed to do more
4 discovery to set the RAND rate, and because you wanted to put
5 in all these contracts you had gotten in for RAND rates. So
6 that argument is just not going to make it, so know that.

7 MR. JENNER: All right. Then I'll leave that. But
8 the fact of the matter is that the actions are still
9 different actions. The German proceeding, number one, patent
10 infringement proceedings, has nothing to do with Seattle.
11 Seattle can't deal with that. It wouldn't be appropriate for
12 Microsoft to have brought German declaratory judgment claims
13 here to raise that, because it's properly in Germany.

14 The other issue that the court is dealing with in
15 anticipation of its April 17th order is the Orange Book
16 proceeding. And one of the questions I think Your Honor
17 asked is essentially what are the things that go on with the
18 Orange Book procedure? What can Microsoft do?

19 Your Honor, my understanding of the Orange Book procedure,
20 to go into it a little bit --

21 THE COURT: I find it quite ironic, by the way, that
22 Microsoft's former lawyers, Quinn Emanuel -- I assume are
23 former -- are now representing Motorola in Germany.

24 MR. JENNER: Are they Microsoft's former lawyers? I
25 don't think so.

1 THE COURT: No, they are.

2 MR. CULBERT: If they were, Your Honor, it was some
3 time ago.

4 THE COURT: I understand. But I certainly know that
5 that's where they came from.

6 MR. JENNER: Well, Your Honor, that's news to me, but
7 equally surprising. The German Orange Book procedure is a
8 unique remedy that we certainly don't have here, in which the
9 German court, in finding infringement, gives the right to the
10 prevailing patentee to receive an injunction. But it says
11 that the losing party can avoid the injunction entirely by
12 complying with the Orange Book remedy.

13 The Orange Book remedy calls upon Microsoft to make an
14 Orange Book offer, which it did make, it was one or two cents
15 per unit, and said this should be sufficient to avoid an
16 injunction. Microsoft, you won't be surprised, rejected
17 that, thinking about the \$5 and \$10 per unit that Microsoft
18 is asking about. Microsoft rejected that --

19 THE COURT: Hold on, you said --

20 MR. JENNER: Motorola. Motorola rejected that as
21 being unreasonable. And it's now up to the court, as part of
22 what it will decide on April 17th, to decide whether or not
23 it was reasonable for Motorola to turn down the 1-cent 2-cent
24 offer. If it decides that the offer was adequate, then the
25 action will be dismissed. Microsoft can use the patents just

1 as if they were licensed. They will have to continue to
2 accrue payments if they go up on appeal, so that they will
3 have to continue to deposit money.

4 But that would be a situation where, because the offer has
5 been accepted there's no injunction. So down that prong of
6 Orange Book, there is no harm of any kind to Microsoft at
7 all. They've just been called to task for being an
8 adjudicated infringer in Germany, and they've paid what it
9 takes to get the Orange Book remedy.

10 THE COURT: This is as good a place as any, because
11 I'm not sure what you're going to say in the future. I'm
12 looking at the ITU agreement, which I gather everyone now
13 admits is what we're discussing, and the signed agreement
14 that you -- your client put in, checked Box 2. And it says,
15 "The patent holder -- in this instance Motorola -- is
16 prepared to grant a license to an unrestricted number of
17 applicants on a worldwide non-discriminatory basis, and on
18 reasonable terms and conditions to make, use, and sell
19 implementation of the industry standard patents." How is
20 that -- and further they checked the box that said they want
21 reciprocity.

22 If that's Motorola's commitment, and that issue is in
23 front of me here, how is it that I'm going to deal with this
24 German decision over here, and a Brazil decision over here,
25 when I'm supposed to come up with worldwide

1 non-discriminatory RAND terms?

2 MR. JENNER: Well, Your Honor, I guess there are a
3 number of aspects of that.

4 THE COURT: I assume there are.

5 MR. JENNER: There are.

6 Number one, at the end of the day, the Orange Book
7 proceeding in Germany is going to set the payment that
8 Microsoft needs to pay for its infringement in Germany, and
9 it will deal with the German infringement. That may or may
10 not be RAND. That's probably an issue of first impression in
11 Germany. People seem to think that it's RAND. Microsoft has
12 made submissions that I can show you where it has called it
13 RAND. It may or may not be RAND.

14 If it is RAND, it's a factor, when the day comes, that
15 Your Honor can take into account, or not take into account,
16 as some evidence of what the RAND rate ought to be. You may
17 agree eventually with the German court. You may not. If it
18 isn't RAND you may look at that and dismiss it and say, I
19 don't think it's RAND in Germany, I'm going to set a
20 different rate. And to the extent that my rate is lower than
21 the German rate, I'm going to order Motorola to pay back to
22 Microsoft the differential that it, quote/unquote, overpaid
23 in Germany. In which case there will be like a remittitur.
24 But that's not irreparable harm, that's a damages claim.
25 That doesn't prevent Your Honor from deciding those issues,

1 or even deciding if you thought it was appropriate and that
2 Germany was RAND, that you want to carve Germany out and say,
3 we know what the rate is for Germany, I think the rate should
4 be different worldwide, and I'm going to set a different rate
5 if it comes down to that.

6 The fact that there's going to be a worldwide license
7 doesn't mean that the rate is the same in every country.
8 Motorola has licenses with rates that are different in
9 different countries. The number of H.264 patents may be
10 different in different countries. It doesn't necessarily
11 follow, if you go down that particular possibility, that
12 you're going to decide that the rate in every country is
13 supposed to be the same. That's not a given.

14 So, whatever happens in Germany, it doesn't preclude Your
15 Honor from coming up with a number of different results that
16 might embrace the German decision, or may say, "I'm going to
17 ignore the German decision."

18 THE COURT: Is any of that argument in your briefing?

19 MR. JENNER: I'm sorry, Your Honor?

20 THE COURT: Is any of that argument in your briefing?

21 MR. JENNER: I don't think so, Your Honor. I guess
22 it flows from the Orange Book remedy. It flows from the
23 Orange Book remedy.

24 THE COURT: It was news to me. I've never heard that
25 particular take on it before.

1 MR. JENNER: The way that it's in there collapses
2 down to this. It collapses down to the fact that whatever
3 Microsoft is ordered to pay, pursuant to the Orange Book in
4 Germany, as a consequence of the infringement in Germany,
5 will result in a payment -- all this business about job
6 losses, shutting down plants, none of that will ever happen.

7 And to the extent Your Honor finds something different
8 from Germany that you don't agree with, Your Honor will have
9 the opportunity, should you deem it appropriate, simply to
10 tell Motorola to pay back the difference in Germany. That's
11 not an encroachment on your jurisdiction. I guess that goes
12 to the comity part as well. That's not an encroachment on
13 your jurisdiction. You will simply find that the court
14 didn't determine a RAND rate in Germany. You did determine a
15 RAND rate in Germany, to the extent that Motorola ought to
16 pay some German money back to Microsoft. Microsoft has got a
17 damages claim for that money, and that's a damages claim,
18 it's not irreparable harm.

19 THE COURT: But I think what Mr. Harrigan was trying
20 to tell me was that all they want is an injunctive relief
21 against an injunction prohibiting the sale of the product.
22 And that if we set, as I suspect we will in September, the
23 RAND rate, and Germany decides the RAND rate in Germany is
24 higher or lower, money may flow one of two directions. You
25 may be getting more money. You may be having to pay

1 Microsoft money.

2 MR. JENNER: But, Your Honor, why would that be the
3 kind of harm, being a damages claim, that would move into
4 comity, justify a U.S. court in stepping in and interfering
5 with the implementation of German laws by a German court in a
6 patent infringement case?

7 THE COURT: Well, first off I'm not sure irreparable
8 injury is even required in this instance. I mean, that's an
9 open question under the interplay of *Gallo* and the *Winter*
10 standards.

11 MR. JENNER: I think it's murky, Your Honor, because
12 what *Gallo* says is that it's -- it is substituting the
13 three-part anti-suit injunction factors for the necessity to
14 prove a likelihood of success on the merits. It substitutes
15 those two factors. It doesn't say definitively whether it's
16 removing the others or not.

17 THE COURT: Right.

18 MR. JENNER: And as I think counsel alluded to, the
19 issue of whether or not there's irreparable harm could come
20 back under the second anti-injunction factor under the rubric
21 of other equitable considerations.

22 So it's hard to say whether it's there or not, because
23 this again is another issue of first impression.

24 THE COURT: Well, I'm much taken with one of my
25 learned colleagues here, Judge Davila, in the *Zynga* case.

1 He's another one laboring in the trenches and not from the
2 heights of the circuit. The footnote that he wrote I think
3 captures this nicely. He says, "It is arguably unclear from
4 the Ninth Circuit case law whether the three anti-suit
5 injunction factors replace all four *Winter* preliminary
6 injunction factors, or whether they replace only the
7 requirement that the movant show a likelihood of success on
8 the merits of the underlying claim."

9 MR. JENNER: Right.

10 THE COURT: I think that's what you just said.

11 Then he quotes *Gallo* saying, "Movant need not meet the
12 usual test of the likelihood of success on the merits on the
13 underlying claim to obtain an anti-suit injunction, rather
14 movant need only demonstrate that the factors specific to the
15 anti-suit injunction weigh in favor of granting the
16 injunction." He then goes on to add some law saying, "Under
17 a literal reading of *Gallo*, a showing of irreparable harm,
18 balance of equities and public interest might still be
19 required to obtain an anti-suit injunction. But the absence
20 of any mention of the *Winter* factors by the *Applied Medical*
21 *Distribution* court suggests otherwise." And then he says,
22 "The Third Circuit expressly supports the replacement of all
23 four *Winter* factors."

24 That leads me to think that, you know -- I won't call
25 anything my betters do unclear, but it seems somewhat murky.

1 MR. JENNER: That's why I agree with you. I think I
2 used the word "murky" myself, Your Honor. I agree it's not
3 clear, if irreparable harm is required still, either because
4 it carries over from the old test, or because it is subsumed
5 in factor two of the anti-suit injunction factors, then I
6 think we have explained in spades why there won't be any
7 irreparable harm here, unless Microsoft decides to inflict
8 the wound itself of not complying with the Orange Book
9 procedure.

10 If it wants to do away with its parents and then complain
11 that it's an orphan, it can do that. But the fact of the
12 matter is that it has within its power the total ability to
13 comply with the law in Germany and remove every vestige of
14 irreparable harm that it put in its opening papers.

15 And as far as *Zynga* is concerned, Your Honor -- just
16 staying with that for a second -- *Zynga* is a case where while
17 they granted a TRO at the outset, they came back a couple of
18 months later and tossed out the TRO, in substantial part
19 because, like this case, there were foreign proceedings on
20 foreign copyright law, and the court concluded that it
21 wouldn't be appropriate for the U.S. court to interfere with
22 foreign copyright proceedings. And that's really what
23 they're asking you to do here.

24 So that all goes to the differences in the nature of the
25 proceedings. The proceedings are really different. When you

1 look at *Applied Medical's* references to functionally
2 disposing of all the issues of the case, the Seattle case
3 can't do that. The Seattle case -- the way that Microsoft is
4 serving it up is, ignore the fact that it's a German patent
5 infringement proceeding, with German remedies that are quite
6 well elucidated, and just focus on the monetary compensation
7 aspects of both of them, and consider them to be the same.
8 They don't have to be the same, and Your Honor has many ways
9 down the road in which you might deal with that, including
10 either embracing what they do, or rejecting it as not being
11 RAND.

12 It doesn't usurp your ability to go ahead in the fall,
13 decide what the RAND rate is, decide where it's going to
14 apply, decide whether it's going to be different in different
15 countries, decide whether you like what Germany came up with
16 or not. And if you don't, tell Motorola, you've got a
17 remittitur here, as part of my ruling you're going to have to
18 pay some money back.

19 That doesn't interfere enough with what Your Honor will be
20 looking at to justify invading the province of the German
21 court.

22 THE COURT: Does that mean that Motorola is prepared
23 to post a \$300 million bond?

24 THE COURT: I don't think it works that way. Well, I
25 shouldn't say that. If Motorola decides --

1 THE COURT: You just told me that you may be paying
2 money back. And I'm just asking you what security you're
3 going to post for Microsoft. And now I hear you're running
4 away from that argument.

5 MR. JENNER: They have to post security in Germany in
6 order to enforce the injunction. So there will be security
7 imposed. There will probably be a pretty substantial bond
8 put up required by the German court, if Motorola decides to
9 go ahead and implement the injunction. So there is going to
10 be money put up by Motorola, quite a bit. That's going to
11 happen. So those are a lot of the issues on the first prong
12 of this.

13 As far as the second prong is concerned, this is the one
14 that has to do with equitable factors that would justify
15 intervening in the foreign proceedings. In *Gallo*, the court
16 only looked at the first one from the Fifth Circuit, "Will
17 the foreign litigation frustrate a policy of the domestic
18 forum." And the reason the court in *Gallo* only looked at
19 that one of the four is because that's the one that involved
20 the forum selection clause. And no matter what Microsoft
21 wants to say, *Gallo* is all about a forum selection clause.

22 In fact, the case ends -- something that's not highlighted
23 -- on page 7, in Roman III, the last two paragraphs, the
24 court says, "Andina has involved Gallo in messy, protracted,
25 and potentially fraudulent litigation in Ecuador, in direct

1 contravention of a valid and enforceable forum selection
2 clause. This is a paradigmatic case for a preliminary
3 anti-injunction suit."

4 So *Gallo* is all about forum selection clauses. So was
5 *Applied Medical*. So was one of the district court cases that
6 Microsoft brought up, strategic intent, which was essentially
7 a clause that gave the right to the moving party to choose
8 where to bring the case. And the court called that
9 tantamount to a forum selection clause. So all those cases
10 are quite different. And there was a policy of the court
11 involved.

12 THE COURT: In your client's letter in this matter,
13 which is in one of these notebooks, don't you offer to
14 license this worldwide at one rate?

15 MR. JENNER: We offer a rate. We offer a rate going
16 in, absolutely. We offer a rate of two-and-a-quarter
17 percent. That was the opening rate offer, no question about
18 it.

19 THE COURT: Confirm Motorola's offer to grant
20 Microsoft a worldwide non-exclusive license at that
21 particular rate?

22 MR. JENNER: That was the offer.

23 THE COURT: And now I hear you saying, well, judge,
24 that's true. But we can also have a German rate, and we can
25 have a French rate, and we can have a Canadian rate. And

1 that's not inconsistent with granting a worldwide
2 non-exclusive rate.

3 MR. JENNER: Absolutely not. The parties do that all
4 the time when they negotiate. And that likely would have
5 happened here if Microsoft had ever engaged and negotiated.
6 Parties negotiate because they learn from each other what
7 each other thinks the relevant terms are in different
8 countries. Somebody will come along and say, I'm not going
9 to pay you two-and-a-quarter percent in China, because you
10 have one crummy patent in China. And no Chinese court will
11 ever enforce this, so the rate in China has got to be a lot
12 lower. That happens. And there are agreements that reflect
13 that.

14 That could have happened here if Microsoft had engaged and
15 negotiated. That's the problem with not negotiating. And I
16 submit Your Honor is going to have to look at factors like
17 that in order to decide whether or not there should, in fact,
18 be one uniform rate, or there should be differences in
19 different places. That happens all the time.

20 THE COURT: Well, that strikes me as arguing -- say
21 that again. I want to make sure I understand that.

22 MR. JENNER: Motorola offered a going-in rate.

23 THE COURT: Worldwide.

24 MR. JENNER: Right. And it anticipated that
25 Microsoft would come back and say something. They're going

1 to come back and say, your offer is no good; there's at least
2 ten reasons why your offer doesn't work for us, we want to
3 tell you about what our circumstances are and why we think
4 that license agreements should have differing terms from what
5 you're proposing. That's what almost always happens. That's
6 what's happened in every other licensing situation.

7 THE COURT: But your client is the one that said they
8 wanted -- they're offering a worldwide rate. This is where
9 I'm having trouble. I've got U.S. companies on an
10 international agreement, your client offers a worldwide rate,
11 and now you're saying that's completely illusory because
12 they're going to come back and everybody knows. And one of
13 their points in, I think it's the Prieto, or somebody,
14 declaration is: Judge, if Germany gets this rate, that's
15 going to impact what happens in China, what's going to happen
16 in the United States. Oh, the United States? Gosh, you
17 know, for a worldwide rate in the United States, then you
18 know, it's going to interfere with your prerogative to set
19 this rate, or the jury's prerogative.

20 So it seems to me that argument cuts, to some extent, both
21 ways.

22 MR. JENNER: Your Honor, I really submit that it
23 doesn't. Parties in negotiation situations always make an
24 opening offer. This is a simple offer, two-and-a-quarter
25 percent. Nobody assumed that Microsoft was just going to

1 pick up the phone and say, "That's great, where do we send
2 the check?" These situations are always situations where the
3 other party comes back and says, "We'll come and talk to you,
4 we want to make a presentation as to what we think the
5 appropriate conditions and terms for a license would be."

6 The fact that Motorola started out by saying
7 two-and-a-quarter percent worldwide doesn't mean that anybody
8 expected that it would end up there. That's a typical offer.
9 In Motorola's case it has made it to dozens of licensees that
10 have resulted in negotiated licenses with different terms in
11 them.

12 THE COURT: Well, let me ask you this question, then,
13 because I want to make sure I understand this. Does that
14 mean I'm setting an American rate, and that every other
15 country is entitled to set its own rate?

16 MR. JENNER: It's to be determined I guess, Your
17 Honor, because there's no precedent for this. We don't have
18 anything we can show you that says that this is the way that
19 it's done. No court has ever gotten to the point of doing
20 this. These have always been resolved between the parties,
21 even in the heat of litigation.

22 If this is the one that has to go, we will be having
23 extensive discussions with Your Honor about what the
24 possibilities are and why they make sense, because we haven't
25 got a blueprint for you. There is no blueprint for how to do

1 this. That's part of the problem.

2 THE COURT: Well, I know your extensive discussions
3 are going to be ten days for both of you. So I'm not sure
4 how extensive that's going to be.

5 MR. JENNER: But my point is, Your Honor, there isn't
6 any record that we can give you on -- when you get to the
7 point of actually considering all the relevant circumstances
8 and deciding what the terms of a license here ought to be,
9 you're writing on a clean slate, and neither we nor Microsoft
10 can tell you, look at this case, and that case, and some
11 other case, here's how you do it. It doesn't exist.

12 All I'm saying is whatever you do it doesn't have to be
13 and it won't be inconsistent with what the German court does,
14 if the German court even gets to finality before you do this,
15 which it may not, up on appeal.

16 But, whatever the German court does, if it's your decision
17 to do so, you will have the ability to say, "I don't agree
18 with a piece that the German court did, here's my ruling as
19 to Germany." And if that means that Microsoft paid too much
20 to get out of the way of a speeding train, then it has the
21 claim to get the money back. And it gets the money back as
22 an overpayment.

23 The real issue is, is Microsoft going to stand in front of
24 the train, or is it going to get off the track and comply
25 with the law in Germany? We're talking about complying with

1 the law in Germany. They're asking you to interfere with
2 that.

3 Another analogy, Your Honor, just for the sake of
4 analogies is, picture Microsoft on the Autobahn in Germany,
5 lying down in the road in front of speeding cars in Germany,
6 and instead of picking itself up and getting off the road,
7 which it has the ability to do, it gets on the phone and
8 calls for a Washington State Patrolman to come over and stop
9 traffic. That's what they're asking you to do, instead of
10 getting off the road.

11 They ought to comply with the law in Germany. And down
12 the road, if Your Honor thinks the numbers come out
13 differently, you can fix that. There's no intrusion with a
14 forum selection clause. There is no avoidance of this court
15 with a compulsory counterclaim being filed in Canada, as
16 happened in *Seattle Totems*, which is why, like *Gallo* and
17 *Applied Medical*, they saw a direct intrusion with local
18 jurisdiction. You don't have that here. There isn't any
19 frustration of a policy of this court. This court doesn't
20 have any more unique policy to determine damages than the
21 German court does.

22 If anything, this is a situation where we're talking about
23 local courts setting damages rates. When Your Honor gets to
24 a RAND rate and you think it's inconsistent with Germany, you
25 can fix it. It doesn't keep you from doing what you're going

1 to have to do. It's not a good enough reason to intervene
2 with and shut down the ongoing procedures of the German
3 federal court.

4 THE COURT: Well, counsel, I'm troubled by what you
5 just said for the following reason: I've got two American
6 companies in front of me. I've got an ITU agreement, with no
7 choice of law provision to help me one way or the other.

8 MR. JENNER: Or choice of forum.

9 THE COURT: Or choice of forum. I've got an offer
10 letter drafted by your client, sent to Microsoft in the
11 United States, that says both U.S. and foreign patents, and
12 I've got a Microsoft allegation that that offer letter
13 breached the ITU agreement. It seems to me that those facts
14 strongly imply that I have jurisdiction to adjudicate the
15 terms of the ITU agreement on a worldwide basis. And you've
16 just said, quite passionately, "Judge, no, that's just not
17 right."

18 MR. JENNER: I'm saying Your Honor does have
19 jurisdiction to deal with that. But the fact that the German
20 court reaches a remedy in Germany may be embraced or rejected
21 by Your Honor. It won't keep you from doing what you have to
22 do, like a forum -- the violation of a forum selection clause
23 would do that. It would eradicate local jurisdiction. It
24 would a direct intrusion on the court if there was a forum
25 selection clause, which there isn't. Whatever the German

1 court does, Your Honor has the ability, in going forward, to
2 accept it or reject it.

3 THE COURT: All right. Please continue.

4 MR. JENNER: The other aspects of the equitable
5 justifications, the one we've been talking about is
6 frustrating a policy of the domestic forum. And for the
7 reasons I've said, I don't think it does. If anything, to
8 some extent if Your Honor acted the way Microsoft wants, you
9 would be actually be frustrating a policy of the German
10 forum. So I think that's something that's fairly taken into
11 account, too, in enabling the German court to run the gamut
12 of its procedures and reach a result that applies in Germany.

13 THE COURT: Is that fact any clearer than this
14 ambiguity that you've written large today?

15 MR. JENNER: Well, you will be stopping the Orange
16 Book procedures if you grant the injunction. Microsoft says
17 all that does is prevent the award of an injunction. That's
18 not really true, because what the Orange Book procedure does
19 is enable a negotiation. The negotiation is that Microsoft
20 knows it needs to come up to an appropriate level. If it
21 doesn't the German court is going to tell it, it's not
22 acceptable, you're going to be enjoined. Motorola knows it
23 has to come down, because if its offer is found to be
24 unreasonably high, there are issues that face Motorola as
25 well.

1 So, the way the German system has it configured, there are
2 pressures on both sides that encourage the parties, with or
3 without the German court's assistance, to arrive at an
4 acceptable rate. If you take the threat of injunctive relief
5 in Germany out of that, you are not just removing the
6 injunction, you are negating the way the Orange Book
7 procedures work. You can't get around that.

8 THE COURT: I've never seen anyone suggest that I'm
9 going to enjoin the German court. I'm going to enjoin
10 Motorola, if I granted Microsoft's proposed relief.

11 MR. JENNER: But it has the same effect. And the
12 cases note that. The cases note that all anti-injunction
13 suits are against the parties, but they note that it has
14 severe impacts on the workings of the foreign courts. If
15 Motorola is enjoined here from exercising the remedy
16 procedures in Germany, it has the effect of negating the
17 working of the Orange Book procedure. The way the German law
18 has it set up, it will do that.

19 THE COURT: Where is that in the record, because
20 we've searched for that?

21 MR. JENNER: I guess, Your Honor, it's my reply
22 orally to Microsoft's reply brief, which I don't get a chance
23 to do in writing. I appreciate Your Honor wanted to know
24 more about the Orange Book proceeding and what Microsoft can
25 do, and that's why I'm going there. It has the total ability

1 to deal with the injunction, to maintain itself, doing what
2 it's doing in Germany. All that it really has to do, Your
3 Honor, when you think about it, is to take the \$300 million
4 that it was perfectly prepared to put on hold here, and
5 instead take the same \$300 million and put it in escrow in
6 Germany where the proceedings are that require it, where it
7 will be in escrow. And by the way, I think there was
8 something Microsoft said, where Motorola then takes that
9 \$300 million and runs. That's not true. Motorola can't take
10 any of the money until Microsoft says so, or the court says
11 so.

12 And that will be an appropriate remedy in Germany to
13 prevent the injunction from going into place. Microsoft is
14 in complete control of that. It's not a reason for an
15 invasion of comity.

16 And that brings me then just to the last factor, which is
17 would an injunction of the kind Microsoft is asking, offend
18 international comity? And I submit, Your Honor, that with
19 respect to this court, the answer is, yes. You're being
20 asked that the U.S. court interfere with a German court's
21 enforcement of German patents, German patent infringement
22 proceedings, and the German remedy proceedings that go with
23 that, and I submit that that is an intolerable intrusion on
24 another country's prerogatives.

25 I submit that if I were a U.S. court and a German or

1 Brazilian court were to take the steps to say that I cannot
2 proceed with enforcement proceedings on a U.S. patent, I
3 would find that to be an intrusion, to be an intolerable
4 intrusion on comity, and invasion of the rights of the U.S.

5 It's even more so, because in seeking that invasion on
6 comity, Microsoft is doing it when they have available to
7 them the ways to avoid the speeding train. All they have to
8 do is comply with the procedures that the German courts have
9 given them, which you don't find in other countries. It's a
10 benefit to them in Germany that they can get out of the way
11 of an injunction simply by complying with German law.

12 And once again, that would avoid the intrusion on comity,
13 and whatever Your Honor needs to do later could remedy that,
14 take it into account, accept it, not accept it. You don't
15 have to interfere with the German proceedings in order to
16 effectuate whatever you will decide later.

17 And I want to emphasize contrary to the suggestion that I
18 heard back in argument two months ago that this is something
19 that ought to happen in the Ninth Circuit, because the Ninth
20 Circuit is so liberal in granting anti-suit injunctions. I
21 don't know where that came from. I read the cases that say
22 that. They talk about *Seattle Totems*, *Gallo* and *Applied*,
23 because they granted injunctions. Two of them had forum
24 selection clauses, the third one of them had the compulsory
25 encounter claim in Canada. Any court would have put a stop

1 to that. And all three of those courts say that
2 anti-injunction suits should be sparingly granted. So it's
3 just not true that this ought to be looked at much more
4 because the Ninth Circuit has some sort of a give-away
5 attitude about anti-injunction suits.

6 Your Honor, I don't know if I've exceeded my time.

7 THE COURT: You have about two minutes left if you
8 want to use it.

9 MR. JENNER: The only other point I want to make, I
10 think I've covered most of what counsel said. Counsel made a
11 reference to their motions for summary judgment. Their
12 motions for summary judgment are -- what Your Honor gave them
13 leave to continue is whether or not Motorola was required to
14 make a RAND offer, as opposed to reach a RAND license. And
15 did Motorola, in fact, make a RAND offer. None of that will
16 lead to a determination of the RAND rate.

17 There is a separate summary judgment motion pending as to
18 whether or not they're entitled to an injunction. I submit
19 to Your Honor that had nothing to do with Germany. It came
20 after the German proceedings, but it was not focused on
21 Germany any more than the other summary judgment motion was.
22 The fact of the matter is to the extent that Your Honor
23 cares, these German proceedings have been pending since the
24 summer of 2011. Microsoft didn't do anything about this.
25 They, shall we say, inequitably sat on their rights until a

1 month ago, when they could have taken steps a lot longer ago
2 to do something about this.

3 So to the extent that it matters, that's another factor
4 Your Honor can take into account.

5 THE COURT: Well, since you ventured into German law,
6 what prevents Microsoft from making an offer in Germany right
7 now?

8 MR. JENNER: They've already made one, and they can
9 make another. They're waiting for the April 17th
10 determination, understandably, because the court in Germany
11 is going to say on April 17th, assuming it finds
12 infringement, it will say on April 17th whether or not the
13 first offer, it was reasonable for Motorola to reject it. If
14 the court says that, and that offer is then off the table,
15 the Orange Book proceeding provides the right for Microsoft
16 to ratchet up the offer. It can do that.

17 THE COURT: All right. Anything else, sir?

18 MR. JENNER: Not at this time, unless Your Honor has
19 got more questions.

20 THE COURT: No, I think I'm there. Thank you.

21 MR. JENNER: Thank you.

22 MR. HARRIGAN: I will be I think brief, Your Honor.
23 What's happening here is that Microsoft, looking at the
24 letter that was sent to us for a worldwide license for 100
25 patents, is asking this court to determine what a reasonable

1 rate -- what a RAND rate is for those patents, which include
2 the two patents in Germany.

3 And what Motorola has done is it's lifted two of those
4 patents out of that list and gone to Germany with them. Why?
5 In order to ask for an injunction so that they can extract an
6 unreasonable royalty.

7 If all they want is for a German court to set the rate on
8 these patents, they don't need to get an injunction. What
9 they want -- the reason they're opposing this motion is they
10 want the threat of the injunction so they can extract
11 something for it.

12 And the comity issue here is that Motorola has taken these
13 two patents that were before this court, along with the other
14 98, and gone to Germany with them for what we believe are
15 nefarious reasons, just as they demanded an exorbitant
16 royalty for the 100 patents worldwide. And the affront
17 here --

18 THE COURT: Is making a profit nefarious?

19 MR. HARRIGAN: I'm sorry, Your Honor?

20 THE COURT: Is making a profit nefarious?

21 MR. HARRIGAN: Well, it's nefarious if it's a breach
22 of contract.

23 And if there's an affront to a court here, it's to this
24 one. I believe from basically saying, well, we've got a way
25 around having this court set a reasonable rate, we're going

1 to Germany and see if they can extract an unreasonable rate.
2 Now, I'm not saying that the court has to find that's what's
3 going on here. But if you look at it, why is Motorola
4 opposing this court's stopping the injunction? We could --
5 they could go through the rate-setting process in Germany
6 without that, if that's all they're after.

7 The second thing, Your Honor, that I'd like to mention is
8 that -- this is a quote from the *RIM* case. And the last time
9 the court heard about this case I believe was in my argument
10 in opposition to the motion to dismiss. So very early in
11 this case. And in the *RIM* Case the court says, "Motorola
12 argues that RIM has two paths before it, to get a RAND rate,
13 both of which lead to fair licensing terms. One of these
14 paths is this court. The other is negotiation outside the
15 court." And then the court says, "Motorola is correct that
16 in the end RIM will receive fair licensing terms. But if
17 those terms must be dictated by this court, it cannot dismiss
18 the action before it has a chance to do so."

19 This is the same behavior pattern. They demanded
20 unreasonable rates from RIM. They said, well, Your Honor,
21 you can't hear this case because we have to negotiate first.
22 And the court basically said -- but Motorola said, and by the
23 way, they're going to get a reasonable license because this
24 court is going to decide what it is if we can't negotiate it.
25 And that is all we're asking this court to do.

1 And we have not heard, Your Honor, we have not heard from
2 Motorola that this court lacks jurisdiction to decide what
3 the RAND rate is for the 100 patents that are the subject of
4 the letter that we've been talking about. Motorola agrees
5 this court can do that. And so why should Microsoft be
6 subject to an injunction in Germany in a situation where in a
7 relatively short time this court is going to set a worldwide
8 rate for all of those patents?

9 So, it doesn't make sense to oppose this motion, unless
10 you have some other reason for wanting to use the threat of
11 an injunction. And it's pretty clear what that reason is.

12 And by the way, with regard to the balkanization argument
13 that the court's going to have to set rates for all these
14 different countries, that is not going to happen. If the
15 court concludes that Motorola is right, I guess the court
16 could set different rates for different countries. There's
17 nothing that says you can't do that. But their own letter
18 says this is a worldwide -- we're offering you a worldwide
19 license at one rate. It's an outrageous rate, but it's one
20 rate. And they don't say, and by the way we're going to talk
21 about all the different rates for the different countries.

22 And we have, in this case, asked the court to set a RAND
23 rate, and we have committed to take a license. So this case
24 will dispose of the matter.

25 I just want to make a couple of additional comments. One

1 is that this is a TRO preliminary injunction matter. We have
2 amply demonstrated that if there's an injunction entered in
3 Germany there will be irreparable harm to Microsoft. The
4 question of whether there is some way that we could avoid it
5 through these German procedures, I've already talked about,
6 it's a way that is designed to produce a rate that is not
7 RAND.

8 But the bottom line is, we're not asking the court to stop
9 the German court from figuring out what the rate should be,
10 we're asking the court to stop Motorola from enforcing an
11 injunction. And the other side of that coin from the
12 standpoint of equitable relief, which is what we're seeking
13 here, is we are willing to post a \$300 million bond to
14 protect Motorola from any damage it could possibly suffer.
15 And Motorola doesn't compete with Microsoft in Germany. It
16 doesn't need to have an injunction to stop Microsoft from
17 selling Windows because it's competing. Its only damage in
18 the period between now and whenever the court sets the rate,
19 is whatever money is owed at the end of the day. And that
20 bond will cover it. So if you're balancing harm, it's clear
21 which side of the seesaw we're on.

22 So, Your Honor, I think I'll conclude with that. Thank
23 you.

24 THE COURT: Thank you, counsel.

25 MR. JENNER: Your Honor, since we did not get a

1 chance to submit anything in reply, surrebuttal or anything
2 like that, I wonder if Your Honor would just take two
3 examples to look at of where Microsoft has represented in a
4 complaint actually to the EU, and in a letter that it sent to
5 Motorola, that it at least understood RAND rate to be
6 equivalent to Orange Book. I don't know whether, in fact, it
7 is or is not. But at least Microsoft at some juncture has
8 thought that it is.

9 THE COURT: If you want to hand them up, that's fine.
10 We'll give them what weight they deserve after we look at
11 them.

12 Counsel, thank you. This is an interesting question. We
13 have gone back and forth a number of times and we'll do some
14 more of that. Given that you've given me an additional ten
15 minutes before lunch, I'll move it up until 3:15. And I'm
16 sure that just kills everyone who has to get on an airplane
17 and fly somewhere, but I want to get this right. So we'll
18 see you all at 3:15 for the court's oral ruling on the
19 motion. We'll be in recess.

20 (The proceedings recessed.)

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C E R T I F I C A T E

I, Debbie K. Zurn, RPR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 12 day of April, 2012.

/s/ Debbie Zurn

Debbie Zurn